

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK  
TRIAL DIVISION  
JUDICIAL DISTRICT OF MONCTON

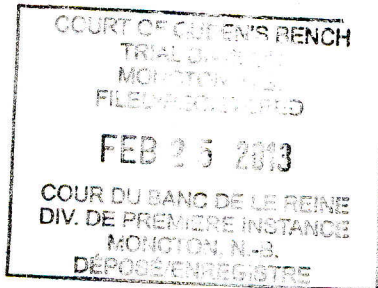
BETWEEN: **ELIZABETH TRACY, SHAWN TRACY** as Litigation Guardian  
for **ELEXI TRACY, DREW TRACY AND ADDISON  
TRACY**, and **SHAWN TRACY** in his own right,

Plaintiffs,

- and -

**MAGIC MOUNTAIN LTD.**, OPERATING UNDER THE  
BUSINESS NAME AND STYLE OF **MAGIC MOUNTAIN  
WATER PARK**,

Defendant.



**STATEMENT OF DEFENCE**  
**FORM 27A**

1. The Defendant, Magic Mountain Ltd., operating under the business name and style of Magic Mountain Water Park (hereinafter referred to as “the Defendant”), admits the allegations contained in paragraph 4 of the Statement of Claim.
2. The Defendant denies the allegations contained in paragraphs 21, 22, 23, 25, 27, 28, 29(i) through (vii), 30, 31, 32, 33, 34, 37, and 38 of the Statement of Claim and puts the Plaintiffs to the strict proof thereof.
3. The Defendant has no knowledge of the facts alleged in paragraphs 1, 2, 3, 5, 6, 8, 9, 10, 11, 13, 14, 15, 16, 19, 20, 24, 35 and 36 of the Statement of Claim and puts the Plaintiff to the strict proof thereof.
4. As to paragraph 12 of the Statement of Claim, the Defendant states that its normal procedure is to open at 10:00 a.m. with an “all clear” signal from a horn, after which patrons are allowed to enter the water park. The Defendant denies all other allegations contained therein and puts the Plaintiff to the strict proof thereof.
5. As to paragraph 17 of the Statement of Claim, the Defendant’s employees stationed at the “Torpedo” water slide provide instructions to riders consisting of proper positioning of the rider’s body and also provide the rider with a countdown before

descending the slide. The Defendant denies each and every allegation contained therein and puts the Plaintiff to the strict proof thereof.

6. As to paragraph 18 of the Statement of Claim, the Defendant admits the Plaintiff Elizabeth Tracy went down the "Torpedo", but denies each and every other allegation contained therein and puts the Plaintiff to the strict proof thereof.
7. As to paragraph 26 of the Statement of Claim, the Defendant admits that its employees wear distinctive clothing bearing the Defendant's name and/or insignia thereon and some employees are equipped with "walkie talkies". The Defendant denies each and every other allegation contained therein and puts the Plaintiff to the strict proof thereof.
8. As to the whole Statement of Claim, the Defendant states:
  - (a) the Defendant operates a water park on Mountain Road in Moncton, New Brunswick;
  - (b) the water park includes various rides and water slides including highspeed water slides;
  - (c) the Defendant contracted ProSlide Technology Inc. (hereinafter "ProSlide"), for the purchase, on-site installation, set up, and commissioning of the "Torpedo" water slide;
  - (d) ProSlide provided/installed the "Torpedo" water slide in/or around June and July 2011;
  - (e) the water slides including the "Torpedo" water slide have warnings posted in various locations;
  - (f) patrons who choose to ride the water slides, including the "Torpedo", do so at their own risk; and
  - (g) if the Plaintiff Elizabeth Tracy chose to ride the "Torpedo" water slide, she did so of her own freewill having been warned of the risks of riding a highspeed water slide.
9. Further, as to the whole of the Statement of Claim, the Defendant states that at all material times:
  - (a) all water slides including the "Torpedo" had been tested and inspected prior to the opening of the park;
  - (b) all water slides including the "Torpedo" were functioning/operating properly;

- (c) it had the appropriate staff, including but not limited to lifeguards, at the water park and assigned to each ride, including the Torpedo;
- (d) its staff are properly trained on the operation and safety procedures for all water slides;
- (e) there are qualified life guarding staff at each water slide at both the ascent and descent stations; and
- (f) patrons of the water park are warned of the risks associated with water activities including riding water slides at the time they enter the park and at various locations throughout the park.

10. Further as to the whole of the Statement of Claim, the Defendant states that if the Plaintiff Elizabeth Tracy was injured while riding the “Torpedo”, which is not admitted but specifically denied, such injuries were caused or contributed by the Plaintiff Elizabeth Tracy’s own negligence as follows:

- (a) failing to read and/or follow the instructions and warnings posted for the “Torpedo” water slide;
- (b) disregarding the warning “Ride at your own risk” found on the instructions posting for the “Torpedo” water slide;
- (c) failing to comply with water slide requirements/restrictions, specifically but not limited to, height and weight requirements/restrictions;
- (d) failing to listen to and/or follow its employees’ instructions regarding body positioning requirements, prior to and/or during, the descent on the “Torpedo” water slide;
- (e) failing to pay due care and attention;
- (f) failing to exercise ordinary and reasonable care for herself and/or take precautions to ensure her own safety; and
- (g) such further and other particulars of negligence which may become known prior to or during Trial.

11. The Defendant pleads and relies upon the doctrine of *volenti non fit injuria*.

12. The Defendant pleads and relies upon the *Contributory Negligence Act*, R.S.N.B. 2011, c.131, and amendments thereto.



13. In the alternative, the Defendant states that if the "Torpedo" water slide was not operating properly, which is not admitted but specifically denied, it was not within the knowledge of the Defendant.
14. The Defendant further states that if there were any problems and/or issues with the "Torpedo" water slide, which is not admitted but specifically denied, those problems and/or issues inherently arose from the "Torpedo" water slide itself and were not the result of any negligence on behalf of the Defendant.
15. On or about February 7, 2011, the Defendant contracted with ProSlide, a corporation carrying on business at 2650 Queensview Drive, Suite 150, in the City of Ottawa, Province of Ontario, for the purchase of the "Torpedo" water slide designed and manufactured by ProSlide. In addition to manufacturing the "Torpedo" water slide, ProSlide was also retained to install, set up, and commission the "Torpedo" water slide at the Defendant's water park.
16. Further and/or in the alternative, the Defendant states that if the Plaintiff Elizabeth Tracy was injured while riding the "Torpedo" water slide, which is not admitted but specifically denied, then such injury was caused by the negligence and/or breach of contract of ProSlide in the design, structural engineering, manufacturing, installation and/or commissioning of the "Torpedo" water slide and technical advisor services of ProSlide, including but not limited to its failure to provide/ensure an adequate control system for water flow and depth of the "Torpedo" water slide and its failure to provide, design, engineer and install a safe and quality controlled product.
17. As to the whole of the Statement of Claim, the Defendant denies that the casualty referred to in the Statement of Claim herein caused the injuries and damages alleged and states, in the alternative, that if such injuries and damages were incurred, then such were too remote and not causally connected and were the result of some prior, subsequent or wholly unrelated incident, accident, illness, calamity or event, for which the Defendant should not in law be found responsible.
18. As to the whole of the Statement of Claim, the Defendant further states that the Plaintiffs have failed to take any or reasonable measures to mitigate any losses, damages or expenses claimed as a result of the aforesaid alleged injury.
19. Save as has been specifically admitted herein, the Defendant specifically denies each and every allegation contained in the Plaintiffs' Statement of Claim and puts the Plaintiffs to the strict proof thereof.
20. The Defendant denies that the Plaintiffs are entitled to the relief claimed in paragraphs 39 (i) through (ix), 40 (i) through (ix), and 41 (i) through (iii) of the Statement of Claim and requests that the Plaintiffs' Action be dismissed with costs.

The Defendant intends to proceed in the English language.

DATED at Fredericton, New Brunswick this 22<sup>nd</sup> day of February, 2013.

**FOSTER & COMPANY**

Per: \_\_\_\_\_

J. Charles Foster, Q.C.  
Solicitor for the Defendant,  
Magic Mountain Ltd., operating under  
the business name and style of Magic  
Mountain Water Park

919 Prospect Street  
Suite 200  
Fredericton NB E3B 2T7  
Telephone: (506) 462-4000  
Telecopier: (506) 462-4001  
[jcfoster@fandclaw.com](mailto:jcfoster@fandclaw.com)